No. 75-621

In the Supreme Court of the United States

OCTOBER TERM, 1975

KATHRYN FRANCES HAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that evidence introduced at her embezzlement trial was the product of an unreasonable search, by a federal credit union examiner, of purses left by petitioner at the credit union office where she was the manager. She also argues that the indictment failed to allege, and the district court failed to instruct the jury on, the jurisdictional element of the embezzlement offense.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on ten counts of embezzling the funds of a federal credit union, in violation of 18 U.S.C. 657. She was sentenced to concurrent terms of four years' imprisonment on each count. A panel of the court of appeals affirmed (Pet. App. 1a-13a; 497 F. 2d 929). After rehearing *en banc*, a divided full court also affirmed, adopting portions of the panel's opinion (Pet. App. 14a-30a; 516 F. 2d 472).

Petitioner was the bookkeeper and office manager of the International Longshoremen's Association Local 1351 Federal Credit Union in Houston, Texas (C.A. App. 7, 10, 13).[1] She had "almost total control of all facets of the operation" (*id.* at 59). In April 1971, during an annual examination of the credit union, John Hale, a senior credit union examiner employed by the National Credit Union Administration, discovered a cash shortage of $30 that could not be accounted for (*id.* at 27-28, 33-34). He also found that interest income on the credit union's outstanding loans appeared insufficient (*id.* at 35). After reviewing individual ledger cards to determine the reason for that insufficiency, Hale discovered what appeared to be delinquent loans amounting to about $22,000 (*ibid.*).

When Hale asked petitioner why these loans had not been reported as delinquent, she stated that the loans had been refinanced and that the extension agreements evidencing the refinancings were not in the file because the credit union's loan officer still had possession of them (*id.* at 35-36). On the next day, petitioner gave Hale several extension agreements, but "four of them had suspicious signatures" that "didn't appear to be authentic" (*id.* at 36). On Hale's inquiry, one of the persons whose purported signature appeared on an extension agreement produced a canceled check and a cash receipt voucher showing that the loan had in fact been paid (*id.* at 37). The payment had not been credited to the borrower's account (*ibid.*).

Hale advised the credit union of his findings and suggested that petitioner be suspended pending a thorough investigation and a verification of all accounts (C.A. App. 37). Petitioner was suspended on April 8, 1971 (*ibid.*).

On April 9, petitioner told Hale by telephone that several missing credit union ledger cards had mysteriously ap-

[1]"C.A. App." refers to the appendix in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

peared that morning on her front porch (*id.* at 38-40). Hale, accompanied by the credit union's president, went to petitioner's home, where she gave Hale the ledger cards. Most of the cards had been torn (*id.* at 39).

In another telephone call later that day, petitioner admitted to Hale that she had been concealing cash shortages for two and a half years (*id.* at 40). Although she denied knowing the cause of the shortages, she said she was willing to make some restitution (*ibid.*).

Petitioner also indicated that she planned to send someone to the credit union to retrieve several of her purses and other personal belongings (*id.* at 41). As Hale gathered up petitioner's personal property, he saw some purses on top of and inside an unlocked file cabinet (*id.* at 41, 44-45). He testified that he opened them "to determine if they were hers" (*id.* at 41, 46). Inside the purses, Hale found credit cards and bills containing petitioner's or her husband's name (*id.* at 41). He also found 175 cash received vouchers totaling about $41,000, most of which were initialed by petitioner as receiving teller and about $35,000 of which had not been posted to the members' share and loan ledgers (*id.* at 49, 85, 101-103; Pet. App. 17a). The vouchers were introduced in evidence at petitioner's trial over her objection (C.A. App. 106-107).

A certified public accountant who subsequently examined the credit union's books and records, including the vouchers found by Hale and the ledger cards given to Hale by petitioner, testified that the books and records revealed discrepancies and irregularities attributable to a procedure known as "lapping" (*id.* at 90-91)—"using later cash receipts to match earlier deposits and relying on posting delay to bridge the gap between what should have been in the coffers and what was" (Pet. App. 14a).

1. Petitioner contends (Pet. 6-10) that the vouchers should have been suppressed as the fruit of a warrantless,

and therefore unlawful, search of the purses she had left at the credit union office. Petitioner did not file a pretrial motion to suppress the evidence; she first challenged the lawfulness of Hale's conduct at trial in the midst of his testimony (C.A. App. 41-42). Petitioner's attorney told the district court that the failure to file a pretrial suppression motion "was deliberate" (*id.* at 42). "[T]his is only one small aspect of the entire case," counsel stated, "and whether we are overruled on this, or not, I'm sure it's not going to jeopardize the government's case" (*ibid.*). The matter was raised at trial, according to counsel, because "we do want to protect our record" (*ibid.*).

Under the new provisions of Rule 12(c) and (f), Fed. R. Crim. P., a motion to suppress evidence must be made prior to trial, and a failure to do so constitutes a waiver of the claim. While those provisions did not become effective until December 1, 1975, they merely codified prior decisional law. See Advisory Committee Note to Rule 12; 8A Moore's *Federal Practice* §41.08[1] (1975); 3 Wright, *Federal Practice and Procedure: Criminal* §673, pp. 111-115 (1969).

The district court had discretion to grant relief from such a waiver. But the district court here, while permitting petitioner to ask Hale several questions out of the jury's presence (C.A. App. 44-45), did not expressly relieve petitioner of her waiver. Indeed, such relief would not likely be deemed appropriate when the failure to file a pretrial motion was admittedly a deliberate tactical decision and when counsel openly acknowledged that a suppression order would not "jeopardize the government's case" (*id.* at 42).

Even assuming that the district court's denial of petitioner's tardy motion was a ruling on the merits that implicitly relieved her of the consequences of her waiver, and that her claim is therefore properly before this Court,

her contention was correctly rejected on the merits by the court of appeals and does not warrant further review.

First, although the court of appeals assumed *arguendo* that Hale opened the purses to look for incriminating evidence (see Pet. App. 17a), his uncontradicted testimony was that he opened them only "to determine if they were hers" (C.A. App. 41). Having been told that petitioner was sending someone to pick up her purses and personal belongings, Hale could properly open a purse "left about the office * * * where he was authorized to be" (Pet. App. 18a-19a) in order to see whether it belonged to petitioner. He was not required to seek a warrant before ascertaining whether petitioner owned and was entitled to remove the purses.

Second, even if Hale had in fact been looking for evidence, a warrantless search of the purses would have been proper. The court of appeals found — and petitioner apparently does not dispute the finding — that "[t]here was probable cause to believe that [the purses] contained evidence" (Pet. App. 20a).[2] When petitioner announced her intention to retrieve her purses, Hale had only two alternatives short of foregoing altogether the opportunity to make an effective search of the purses. He could have either searched them immediately without a search warrant or seized and held them without a warrant for as long a period as was necessary to notify law enforcement officers and request them to obtain a search warrant. Petitioner's argument, as we understand it, is that Hale

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[2] "Probable cause existed to believe that [petitioner] had previously concealed and removed and might again conceal or remove records, and the purses were a likely vehicle for either action. Hale would have been remiss in his duty had he permitted such containers and their contents to be taken away from the accounting files without determining that they were not being so used" (Pet. App. 18a).

should have chosen the latter alternative because that would have occasioned a lesser intrusion than an immediate search.

But here, as in *Chambers* v. *Maroney*, 399 U.S. 42, 51-52, "which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances." In the circumstances of this case — including the fact that the purses had been left by petitioner in places to which she did not have exclusive access, so that her usual expectation of privacy with respect to their contents was necessarily reduced (Pet. App. 18a-19a) — the court of appeals correctly found that "the lesser intrusion was to check the purses for Union documents and, if none were found, to release them without more ado" (*id.* at 19a).

In any event, we agree with the court of appeals that this Court's analysis in *Chambers* is applicable here by analogy. The Court there saw "no difference [for constitutional purposes] between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant" (399 U.S. at 52). That the movable objects here were purses rather than automobiles should not lead to a different result — at least on the facts of this case. Since Hale had probable cause for the search of the purses, and since the purses did not "imply privacy" (Pet. App. 18a) to the extent that one would ordinarily expect, either of Hale's alternative courses would have been reasonable under the Fourth Amendment (see *ibid.*).

Third, even if Hale's actions were deemed an unlawful search, it does not necessarily follow that suppression would be required. Although the court of appeals was willing to "[a]ssum[e] that Hale was the sort of person

to whose searches and seizures the Fourth Amendment applies" (Pet. App. 15a), he was not within the class of officials whose conduct is ordinarily thought to be affected by application of the exclusionary rule.

"[T]he rule's prime purpose is to deter future unlawful *police* conduct" (*United States* v. *Calandra*, 414 U.S. 338, 347; emphasis added). Hale was not a criminal law enforcement officer but a federal credit union examiner whose basic duty was to conduct annual audits and examinations of the books and records of federal credit unions (C.A. App. 27-28). See 12 U.S.C. 1756, 1766(d). It seems to us wholly unreasonable to suppose that, if this Court were to suppress the evidence discovered by Hale, such action would be effective to deter other accountants employed by government agencies from similar actions in the unlikely event such an employee is again confronted with a similar situation. The criminal justice system would thus incur the heavy cost of exclusion of relevant evidence with no corresponding gain to the interest in protecting individual privacy from unauthorized official intrusion.

But even if application of the exclusionary rule would be appropriate in some cases involving an unlawful search by a federal credit union examiner, this is not such a case. In the circumstances here, Hale's conduct, if unreasonable at all, was only marginally so, and thus it is appropriate to take into account the fact that he was an auditor and not a police officer. "As with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served" (*United States* v. *Calandra*, *supra*, 414 U.S. at 348). Application of the rule in this case would not significantly serve "its broad deterrent purpose" (*ibid.*). See also *United States* v. *Peltier*, 422 U.S. 531, 538-539.

2. Under 18 U.S.C. 657, it is a criminal offense for an employee of any "lending, * * * credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by * * * *the Administrator of the National Credit Union Administration*" to embezzle funds belonging to the institution (emphasis added). The italicized phrase was added to the statute in October 1970 (84 Stat. 1016).

The indictment in this case charged in ten substantially similar counts that, on certain specified dates, petitioner, "being an employee of the ILA 1351, Federal Credit Union, Houston, Texas, the deposits of which Credit Union were then and there insured by the National Credit Union Administration," embezzled funds from the credit union in violation of 18 U.S.C. 657 (Pet. App. 7a-8a, 33a-38a). Counts I-VI alleged acts of embezzlement on dates prior to the October 1970 amendment to 18 U.S.C. 657; counts VII-X alleged acts of embezzlement on dates subsequent to that amendment.

At trial the government did not show that the credit union's accounts were insured by the Administrator of the National Credit Union Administration. It did introduce in evidence the credit union's federal charter (C.A. App. 3-4), and the current manager of the credit union testified that it was operating under federal law (*id.* at 5). The district court instructed the jury that one essential element of the embezzlement offense was "[t]hat the defendant was the servant and employee of the ILA 1351, Federal Credit Union as alleged" (*id.* at 175).

Petitioner contends that the indictment's only jurisdictional allegation was that the credit union's accounts were federally insured. She argues that federal insurance did not satisfy the jurisdictional requirements of the statute prior to the October 1970 amendment, which became

effective after the acts alleged in counts I-VI (Pet. 11-12), that there was, in any event, no evidence to support the allegation that the credit union's accounts were federally insured (Pet. 12-14), and that the district court failed to instruct the jury concerning the essential jurisdictional element of the offense (Pet. 14-15). These claims, as the court of appeals noted, were presented for the first time on appeal (Pet. App. 10a-11a, 23a).

The *en banc* court of appeals, adopting the panel's opinion on this issue, correctly rejected petitioner's premise. The court held, though "[n]ot without difficulty" (*id.* at 11a), that the indictment "alleged two jurisdictional bases [*i.e.*, federal insurance and federal incorporation], either of which would do, and proved one of them" (*id.* at 10a). The other was mere "[s]urplusage [which], though subject to being stricken on defendant's motion, does not vitiate an indictment" (*ibid.*). "[A]s a matter of criminal pleading, * * * jurisdiction [was] sufficiently alleged, against objection made for the first time on appeal, by the simple assertion that defendant embezzled from 'the X National Bank' or 'the Y Federal Credit Union' " (*id.* at 10a-11a).

The court of appeals reasoned that the indictment gave petitioner "fair notice" — "she well knew what she was accused of" — and was sufficient "to protect her from further jeopardy" (*id.* at 11a). The court further stated (*id.* at 12a):

> [A common-sense] reading indicates that an entity styled a "Federal Credit Union" is at least very likely to be a federal credit union, whether or not realleged to be such in lower case. Nor need there be fear in this case, such as was expressed in *Stirone* v. *United States*, 361 U.S. 212, * * * that the grand jury which returned this indictment did not mean

> to charge the offense of which [petitioner] was convicted. No prejudice to the substantial rights of [petitioner] appears from the sketchiness of the pleading, and hence it was not fatally defective.

In its *en banc* opinion, the court "emphasize[d] that we hold no more than that this indictment withstands an objection made for the first time on appeal, where it is apparent that [petitioner's] substantial rights were not affected" (*id.* at 22a-23a).

Although petitioner claims that the district court's instructions did not properly submit the jurisdictional element to the jury, she made no objection to the instructions at the time they were delivered (C.A. App. 183), and she may not now complain of their form. Rule 30, Fed. R. Crim. P. In any event, the court's instruction, like the indictment, used the phrase federal credit union (C.A. App. 175). Although we believe it would have been better to spell out in clearer fashion the jurisdictional facts that the jury was required to find, we also believe that the instruction was sufficient in the circumstances of this case to put the jurisdictional element before the jury. Any other result would needlessly exalt form over substance and burden the courts with retrials not necessary to protect substantial rights of defendants.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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